Supreme Court, U.S.
FILED
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No. 92-327

In The

Supreme Court of the United States

October Term, 1992

JACK DAVID KELLY, Individually and
JACK DAVID KELLY, as President/Shareholder of
MAPLE LEAF DEVELOPMENT CORPORATION,

Petitioner,

v.

TREE FARM DEVELOPMENT CORPORATION;
EMORY O. WILLIAMS, JR.;
GEORGE G. PHILLIPS, JR.; E. D. "BOB" PIERCE;
and THE ESTATE OF ABRAHAM L. PIERCE,

Respondents.

**Petition For Writ Of Certiorari To The
District Court Of Appeal, First District
For The State Of Florida**

BRIEF OF RESPONDENTS TREE FARM DEVELOPMENT CORPORATION AND E. D. "BOB" PIERCE IN OPPOSITION TO CERTIORARI

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August 24, 1992

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QUESTIONS PRESENTED FOR REVIEW

In accordance with Rule 15.1, Rules of the Supreme Court of the United States, Respondents Tree Farm Development Corporation ("Tree Farm") and E. D. "Bob" Pierce ("Pierce"), respectfully submit that the questions presented for review by the Petitioner do not accurately depict the issues which would be before this Court should this Court grant the Petition for Writ of Certiorari, because the questions do not accurately reflect the lower courts' holdings.

With regard to Question "A" asserted by the Petitioner, the decision of the Circuit Court in and for Leon County, Florida, specifically held that the substance of the Plaintiff's claim dealt with title to certain real property which was located in Escambia County, Florida. The court then held that since the action was a "local action" it should have been filed in Escambia County, Florida, and, accordingly, transferred the case to the Circuit Court in and for Escambia County, Florida. Consequently, the question would be more appropriately phrased as set forth below.

With regard to Question "B" asserted by the Petitioner, these Respondents respectfully submit that the issue would be phrased more appropriately as set forth below.

QUESTIONS PRESENTED FOR REVIEW – Continued

With regard to Question "C" asserted by the Petitioner, as with Question "A," it is respectfully asserted that the use of the term transfer to another "jurisdiction" is misleading since the transfer was to another county within the same state, and the question would be more appropriately phrased as set forth below.

With regard to Question "D" asserted by the Petitioner, the Respondents find this question to be basically acceptable.

Consequently, Respondents Tree Farm and Pierce respectfully submit the following questions which more accurately reflect the issues which would be reviewed by this Court, should certiorari be granted.

A. Whether the Circuit Court of Leon County, Florida, properly applied the law of the State of Florida in transferring a case to another county within the same state based upon that court's finding that the substance of the Complaint filed by Petitioner related to the title to real property situate in the county to which the case was transferred.

B. Whether the Supreme Court of the State of Florida, as a matter of Florida Constitutional law, had jurisdiction to review a *per curiam* affirmance by the First District Court of Appeal of the interlocutory ruling of the Circuit Court in and for Leon County, Florida.

C. Whether the Circuit Court in and for Leon County, Florida, correctly held that the substance of the Petitioner's Complaint related to title of real property in

QUESTIONS PRESENTED FOR REVIEW – Continued

Escambia County, Florida, and, therefore, as a matter of Florida law, correctly transferred the Petitioner's case to Escambia County, Florida, the county where the property was located.

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OPINIONS BELOW

Respondents Tree Farm and Pierce concur with the statement of opinions below contained in the Petition for Writ of Certiorari; however, these Respondents would additionally assert that the opinions contained in the Respondents' Appendix ("RA"), at RA 2, RA 3, RA 4, and RA 5, are also relevant to this Court's determination as to whether to grant the Petition for Writ of Certiorari. The first opinion contained in the appendix is the July 16, 1991, opinion of the District Court of Appeal, First District, State of Florida, granting these Respondents' motion for treatment of the Petitioner's appeal as an interlocutory appeal for briefing purposes. The second, at RA 3, is the September 12, 1991, decision of the District Court of Appeal, First District, State of Florida, denying the Petitioner's Motion to Supplement the Record on Appeal. The third, at RA 4, is the December 19, 1991, opinion of the District Court of Appeal, First District, denying the Petitioner's Motion for Rehearing. Finally, the opinion of the Supreme Court of Florida, rendered March 10, 1992, denying the Petitioner's motion to reinstate appeal, is found at RA 5.

JURISDICTION

Petitioner's motion for rehearing in the First District Court of Appeal was denied on November 21, 1991. The Petitioner apparently seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a), and Rule

10.1(c) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Article V, Section 3(b) of the Constitution of the State of Florida, (1968), as amended, sets forth the jurisdiction of the Supreme Court of the State of Florida. Its provisions are set forth below:

> (b) JURISDICTION. – The supreme court:
>
> (1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.
>
> (2) When provided by general law, shall hear appeals from final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.
>
> (3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

(7) May issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.

(8) May issue writs of mandamus and quo warranto to state officers and state agencies.

(9) May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

(10) Shall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law.

Article V, Section 4(b) of the Constitution of the State of Florida (1968), as amended, sets forth the jurisdiction of the District Courts of Appeal of the State of Florida. This subsection is set forth in full below:

> (b) JURISDICTION. –
>
> (1) District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.
>
> (2) District courts of appeal shall have the power of direct review of administrative action, as prescribed by general law.
>
> (3) A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before the court or any judge thereof or before any circuit judge within the territorial jurisdiction of the court. A district court of appeal may issue writs of mandamus, certiorari, prohibition, quo warranto, and other writs necessary to the complete exercise of its jurisdiction. To the extent necessary to dispose of all issues in a cause properly before it, a district court of appeal may exercise any of the appellate jurisdiction of the circuit courts.

Article I, Section 9 of the Constitution of the State of Florida (1968), as amended, sets forth the "due process" rights of citizens of the State of Florida. It is set forth in full below:

> **SECTION 9. Due Process.** – No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

Rule 9.130(a)(3), Florida Rules of Appellate Procedure, governs the appeal of "non-final" or interlocutory orders. The provisions of Rule 9.130(a)(3) are set forth below:

> (3) Review of non-final orders of lower tribunals is limited to those which:
>
> (A) concern venue;
>
> (B) grant, continue, modify, deny or dissolve injunctions, or refuse to modify or dissolve injunctions;
>
> (C) determine:
>
> (i) jurisdiction of the person;
>
> (ii) right to immediate possession of property;
>
> (iii) right to immediate monetary relief or child custody in domestic relations matters;
>
> (iv) the issue of liability in favor of a party seeking affirmative relief; or
>
> (v) whether a party is entitled to arbitration.

STATEMENT OF THE CASE

The procedural background of this case as set forth by the Petitioner, is basically adequate; however, Respondents feel it essential to note that Petitioner's statement at page 2 of their Petition that "the lower court's actions have deprived them of their rights to due process of law," must be qualified by the notation that in their "Motion for Supreme Court to Accept Jurisdiction or In the Alternative to Reinstate Appeal," found at A-7 of the Petition, the only "due process" rights asserted by the Petitioner arose under the "Florida Constitution, Art. 1, Section 9." No mention was made of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I.

THE DECISION WHICH THE PETITIONER ASKS THIS COURT TO REVIEW IS NOT A "FINAL JUDGMENT OR DECREE," WITHIN THE MEANING OF 28 U.S.C. § 1257(a) AND, THEREFORE, THIS COURT DOES NOT HAVE JURISDICTION TO GRANT THE INSTANT PETITION.

The Order of the Circuit Court of Leon County, Florida, held simply that the Complaint filed by the Petitioner, in substance, alleged a dispute as to the title of certain real property located in Escambia County, Florida. Accordingly, the court ordered that the case be transferred to Escambia County, Florida, where the property in issue was located. *See* A-3, A-4, and A-5 to Petition for Writ of Certiorari. The Petitioner appealed this order to

the First District Court of Appeal, apparently pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(A). *See* Motion for Treatment as Interlocutory Appeal for Briefing Purposes, found at RA 6, and Order of the First District Court of Appeal granting Pierce's Motion for Treatment As Interlocutory Appeal for Briefing Purposes, found at RA 2.

This Court has held that to be reviewable, the state court judgment "must . . . be final as an effective determination of the litigation and not of only merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Commission,* 324 U.S. 548, 551 (1945). This Court has also held that a state court order determining the proper venue for a case to proceed is not a final judgment, unless an important federal policy would be defeated by an incorrect assignment of venue. *Cincinnati Street R. Co. v. Snell,* 179 U.S. 395 (1900).[1]

Consequently, this Court does not have jurisdiction to grant the instant Petition for Writ of Certiorari, because the order sought to be reviewed was not a "final judgment or decree" within the terms of the applicable statute which determines the jurisdiction of this Court, 28 U.S.C. § 1257.

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[1] *Mercantile National Bank v. Langdeau,* 371 U.S. 555 (1963), is distinguishable because the determination of venue in that case was based upon an interpretation of a federal statute. In this case, the determination of venue is based entirely upon Florida state law.

II.

THE PETITION FOR WRIT OF CERTIORARI WAS NOT TIMELY FILED AND, THEREFORE, THIS COURT DOES NOT HAVE JURISDICTION PURSUANT TO RULE 13 OF THE RULES OF THE UNITED STATES SUPREME COURT.

Rule 13 of the Rules of the United States Supreme Court requires that petitions for writs of certiorari to review a judgment entered by a state court of last resort must be filed with the Clerk of this Court within 90 days of the entry of judgment. The question, of course, then becomes one of determining precisely what the "judgment" is as to which review is sought. Respondents Tree Farm and Pierce respectfully suggest that the order of which Petitioner seeks review is the District Court of Appeal's *per curiam* affirmance of the Circuit Court's interlocutory order. The District Court of Appeal denied rehearing on December 19, 1991 (RA 4). Petitioner did not seek an extension of time to file his Petition for Writ of Certiorari until some time in June, 1992, approximately six months after rehearing was denied by the First District Court of Appeal.[2]

The Florida Constitution, Article V, § 3(b), was amended in 1980 limiting the appellate jurisdiction of the Florida Supreme Court. That Florida Constitutional Amendment made the District Courts of Appeal, for most

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[2] Although the grounds for Petitioner's application for extension of time were that he was unable to retain counsel to file the instant petition, the instant petition was, in fact, filed by the same attorney who has represented the Petitioner since at least February of 1991.

cases, the "court of last resort." *Cf.* FLA. CONST. Art. V § 4(b) (1968), as amended. This limited jurisdiction of the Florida Supreme Court has been previously recognized by this Court. *See Palmore v. Sidoti,* 466 U.S. 429, 431 (1984); *Williams v. Florida,* 399 U.S. 78, 80 n. 5 (1970). The Florida Supreme Court has held that it does not have jurisdiction to review a "Per Curiam Affirmed" opinion of a district court of appeal. *Dodi Publishing Co. v. Editorial America, S.A.,* 385 So.2d 1369 (Fla. 1980); *Jenkins v. State,* 385 So.2d 1356 (Fla. 1980). This lack of jurisdiction was also recognized in this very case by the Supreme Court of Florida as illustrated by its Order of January 27, 1992, found at A-2 of Petition, and the March 10, 1992, denial of the Petitioner's "Motion to Reinstate Appeal," found at RA 5.

Consequently, in this case, the District Court of Appeal was the "court of last resort," and the Petitioner did not initially seek an extension of time until early June of 1992, nearly six months after the denial of the motion for rehearing by the District Court of Appeal on December 19, 1991. Consequently, the Petition for Writ of Certiorari is untimely, and should therefore be denied.

III.

THE PETITIONER HAS FAILED TO PRESENT ANY SUBSTANTIAL FEDERAL QUESTION WHICH WAS RAISED BEFORE AND DECIDED BY THE STATE COURTS, AND, THEREFORE, CERTIORARI WOULD BE INAPPROPRIATE PURSUANT TO SUPREME COURT RULE 10.1(c).

Supreme Court Rule 14.1(h) requires that:

> If review of a judgment of a state court is sought, the statement of the case shall also specify

> the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them, and the way in which they were passed upon by those courts . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on a writ of certiorari.

The Petitioner in this case has made no effort whatsoever to comply with this Rule, the sole federal issue articulated in the Petitioner's "Statement of the Facts" being an oblique reference to "depriving Petitioner of his rights without due process of law" in the final sentence thereof.

Prior to the Petition filed with this Court, the only reference to any federal constitutional issue was contained in a "Motion for Rehearing on Order Denying Appellant's Motion to Supplement Record on Appeal" filed in the District Court of Appeal on September 27, 1991. This motion may be found at RA 11. Further, that assertion therein of Fourteenth Amendment rights was solely in the context of the Court allowing a prior attorney who had represented the Petitioner to withdraw from the representation. Further, it must be noted that in the Petitioner's "Motion for Supreme Court to Accept Jurisdiction or In the Alternative, to Reinstate Appeal," the Petitioner made no reference to federal constitutional rights, and in fact, referred specifically, and solely, to the "due process" provision found in Article I, Section 9 of the Florida Constitution. *See* A-7 at paragraph 2.

This Court has long held that it is without jurisdiction to review state court judgments unless the federal

question is not only substantial, but also properly raised in the prior state court proceedings. *See Crowell v. Randell*, 10 Pet. 368, 391-98 (1836). *See also, Illinois v. Gates*, 462 U.S. 213, 218-20 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). The federal question must have been raised, presented, and pursued in a timely and proper manner at the appropriate point or points in the state court proceedings. *Beck v. Washington*, 369 U.S. 541, 550-54 (1962); *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919). If "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). If the highest state court is silent on the asserted federal question, the Court will assume, unless it can be affirmatively shown otherwise, that the state court's silence is due to the procedural deficiency of the assertion of the federal question. *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 309 (1903).

Further, this Court has held that a petitioner may very well have waived a federal issue that has not been asserted and argued before the highest state court, *Beck v. Washington*, 369 U.S. at 553.

This Court has also in the past held that merely referring to "due process of law" is insufficient to properly frame a federal question for the Court to exercise jurisdiction. *Bowe v. Scott*, 233 U.S. 658, 664-65 (1914). *See also Brady v. Maryland*, 373 U.S. 83, 91 (1963) (opinion of White, J.); *Minnesota v. National Tea Co.*, 309 U.S. 551, 559 (1940) (Hughes, C. J., dissenting).

Finally, if the Petitioner, as happened in this case, does not raise the federal question until the Petition for Writ of Certiorari, the assertion of the federal question comes too late. *See White River Lumber Co. v. Arkansas, Ex. Rel. Applegate*, 279 U.S. 692, 700 (1929); *Whitney v. California*, 274 U.S. 357, 362-63 (1927); *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.*, 252 U.S. 341, 344 (1920); *Thomas v. Iowa*, 209 U.S. 258 (1908).

Even had the Petitioner properly presented and argued a federal question in state courts, the issues implicated in the instant case simply do not constitute a "substantial federal question." The issues involved are exclusively those of state law. In essence, the basis of all appeals by Petitioner to date have been grounded in the circuit court's construction of the Florida "Local Action Rule." *See Georgia Casualty Company v. O'Donnell*, 109 Fla. 290; 147 So. 267 (1933). All that has occurred is a ruling that the case should not have been filed in Leon County, Florida, and should be transferred to the Circuit Court in and for Escambia County, Florida. Petitioner is not being denied a right to seek his remedy; rather, he is simply being required to seek his remedy in Escambia County, Florida, where, it must be noted, both he and his present counsel reside. He has never articulated any prejudice which he might suffer by litigating the case in Escambia County, as opposed to Leon County, Florida. He has never articulated any reason for his opposition to the transfer other than his claimed "absolute right" to bring an action in a court of his choosing which is, of course, contrary not only to Florida's Local Action Rule, but also to the federal venue statutes. In other words, the Petitioner has not presented any federal question at all in this

case, and certainly not one which could reasonably be called "substantial."

In summary, the Petitioner failed to raise any federal question at any level of the state court proceedings, such issue not having been raised until the Petition for Writ of Certiorari was filed with this Court. Consequently, the Petitioner has asserted no substantial federal question justifying the invocation by this Court of its certiorari powers.

CONCLUSION

This Court should not grant the Petition for Writ of Certiorari in this case for three reasons. First, the decision sought to be reviewed is not a "final judgment or decree" within the terms of the jurisdictional statutes of this Court. Second, the Petition in the instant case was not timely filed. Finally, the Petitioner failed to raise any federal question whatsoever, and even if he had raised a substantial federal question, such question was not raised in a timely manner in the prior state court proceedings. As a result of all of the foregoing, separately and cumulatively, Respondents Tree Farm and Pierce respectfully submit that this Court should decline to exercise its

discretionary power to review the State Court's decision by Writ of Certiorari.

Respectfully submitted,

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Counsel of Record
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BOND, STACKHOUSE & STONE
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(904) 434-9200

No. _____

In The

Supreme Court of the United States

October Term, 1992

JACK DAVID KELLY, Individually and JACK DAVID KELLY, as President/Shareholder of MAPLE LEAF DEVELOPMENT CORPORATION,

Petitioner,

v.

TREE FARM DEVELOPMENT CORPORATION; EMORY O. WILLIAMS, JR.; GEORGE G. PHILLIPS, JR.; E. D. "BOB" PIERCE; and THE ESTATE OF ABRAHAM L. PIERCE,

Respondents.

Petition For Writ Of Certiorari To The District Court Of Appeal, First District For The State Of Florida

APPENDIX TO BRIEF OF RESPONDENTS TREE FARM DEVELOPMENT CORPORATION AND E. D. "BOB" PIERCE IN OPPOSITION TO CERTIORARI

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Fl. 32399
Telephone (904) 488-6151

DATE July 16, 1991

LT 90-3398

CASE NO. 91-1185

JACK D. KELLY, et al.
appellant/petitioner

vs.

TREE FARM DEVELOPMENT CORP., et al.
appellee/respondent

ORDER

Appellee's motion for treatment as interlocutory appeal for briefing purposes, filed June 28, 1991, is granted.

By order of the court

JON S. WHEELER, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Jack D. Kelly
Philip A. Bates
Carl R. Pennington, Jr.
Emory O. Williams, Jr.
Albert C. Penson
Paul F. Hartsfield
Burton Strubhar
Stephen Reid Moorhead

/s/ Laurie Black
Deputy Clerk

[SEAL]

RA 3

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Fl. 32399

Telephone (904) 488-6151

DATE September 12, 1991

CASE NO. 91-1185

JACK D. KELLY, et al. appellant/petitioner	vs.	TREE FARM DEVELOPMENT CORP., et al. appellee/respondent

ORDER

Appellee's motion filed August 14, 1991, seeking to supplement the record on appeal, is denied.

By order of the court

JON S. WHEELER, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Jack D. Kelly
Philip A. Bates
Carl R. Pennington, Jr.
Emory O. Williams, Jr.
Albert C. Penson

Burton Strubhar
Stephen Reid Moorhead

/s/ Laurie Black
Deputy Clerk

[SEAL]

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

December 19, 1991

CASE NO: 91-01185

L.T. CASE NO. 90-3398

Jack D. Kelly, et al.	v.	Tree Farm Development Corp., et al.
Appellant(s),		Appellee(s).

ORDER

Motion for rehearing,
filed November 22, 1991, is DENIED.

By order of the Court

JON S. WHEELER
CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Jack D. Kelly	Burton Strubhar
Philip A. Bates	Stephen Reid Moorhead
Carl R. Pennington, Jr.	Emory O. Williams, Jr.
Albert C. Penson	Cathi O'Halloran Wilkinson

[SEAL]

/s/ Laurie Black
Deputy Clerk

SUPREME COURT OF FLORIDA

TUESDAY, MARCH 10, 1992

JACK D. KELLY, etc., Appellant, v. TREE FARM DEVELOPMENT CORPORATION, et al., Appellees.	CASE NO. 79,254 District Court of Appeal, 1st District – No. 91-1185

Appellant's Motion to Reinstate Appeal filed in the above cause is hereby denied.

OVERTON, McDONALD, BARKETT, KOGAN and HARDING, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

[SEAL]

TC

cc: Hon. Jon S. Wheeler, Clerk
Hon. Paul Hartsfield, Clerk
Hon. J. Lewis Hall, Jr., Judge
Burton E. Strubhar, Esquire
Philip A. Bates, Esquire
Stephen R. Moorehead [sic], Esquire
Carl R. Pennington, Esquire
Emory O. Williams, Esquire
Albert C. Penson, Esquire

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JACK D. KELLY, individually and JACK D. KELLY as President/ Shareholder of Maple Leaf Development Corp.,

Plaintiff/Appellant,

DOCKET NO: 91-1185

vs.

TREE FARM DEVELOPMENT CORP.; EMORY O. WILLIAMS, JR.; GEORGE G. PHILIPS, JR.; E. D. BOB PIERCE and the ESTATE OF OF ABRAHAM L. PIERCE,

Defendants/Appellees.

_____/

MOTION FOR TREATMENT AS INTERLOCUTORY APPEAL FOR BRIEFING PURPOSES

COMES NOW the defendant/appellee, E. D. Bob Pierce, by and through his undersigned attorneys, pursuant to Fla.R.Civ.P. 1.060, and Fla.R.Civ.P. 9.130, and in support hereof further says:

1. The order of the Circuit Court of the Second Judicial Circuit in and for Leon County, from which his appeal arises, was a non-final order. The Circuit Court merely transferred the action to Escambia County, stating

that "[t]he Motions to Dismiss the Plaintiff's Complaint for failure to state a cause of action have not been heard or disposed of by this court and the same remain pending." (A-2). As there has been no final judgment, this appeal is an interlocutory one. *Duncan v. Pullam,* 198 So.2d 658 (Fla. 2d DCA 1967).

2. The transfer ordered by the Circuit Court was appropriate, as courts may transfer actions when it appears that the action is pending in the wrong county. Fla.R.Civ.P. 1.060.

3. Non-final orders which may be reviewed on interlocutory appeal include orders which concern venue. Fla.R.App.P. 9.130. Though this case more accurately involves subject matter jurisdiction than venue, it should receive the same treatment as a non-final order for purposes of appeal, since the action was transferred into another county. If not treated as a venue action, the appeal must be dismissed, as the Florida Rule of Appellate Procedure allowing for review of non-final orders limits such review to certain types of orders. Fla.R.Civ.P. 9.130. There is no provision allowing appeal of an order concerning subject matter jurisdiction.

4. A non-final order on review must be treated as an interlocutory appeal, in which no record is transmitted to the court, and appellant's initial brief must be served within fifteen days of filing the notice. Fla.R.Civ.P. 9.130(d), (e).

WHEREFORE, this defendant/appellee prays that the court will consider the foregoing and treat this appeal as an interlocutory one for briefing purposes. Defendant/appellee also asks that the current effort on the part of the

Clerk of the Leon County Circuit Court to transmit a "record" be abated, in accordance with Rule 9.130(d), which states that "[a] record shall not be transmitted to the court unless ordered."

/s/ Philip A. Bates
PHILIP A. BATES
Clark Partington Hart Larry
Bond Stackhouse & Stone
125 West Romana, Suite 800
POB 13010
Pensacola, FL 32591-3010
Florida Bar No: 228354
904/434-9200
Counsel for Defendant/Appellee
E. D. Bob Pierce and Tree Farm
Development Corp.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Burton E. Strubar [sic], Esquire, 3298 Summit Boulevard, Suite 31B, Pensacola, FL 32503; Stephen R. Moorhead, Esquire, 700 South Palafox Street, Suite 3C, Pensacola, FL 32502; Carl R. Pennington, Jr., Esquire, POB 13527, Tallahassee, FL 32317; Emory O. Williams, Jr., Esquire, Admiralty Building, Suite 306, 4440 PGA Boulevard, Palm Beach Gardens, FL 33410; and Albert C. Penson, Esquire, POB 589, Tallahassee, FL 32302, by U. S. Mail delivery, this 25 day of June, 1991.

/s/ Philip A. Bates
PHILIP A. BATES

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

JACK D. KELLY, individually and JACK D. KELLY as President/ Shareholder of Maple Leaf Development Corp.,

Plaintiff,

vs.

TREE FARM DEVELOPMENT CORP.; EMORY O. WILLIAMS, JR.; GEORGE G. PHILLIPS, JR.; E. D. BOB PIERCE; and the Estate of ABRAHAM L. PIERCE,

Defendants.

CASE NO. 90-3398

_____/

ORDER ON MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, TRANSFER

THIS CAUSE having come on before the Court upon the Motion of Tree Farm Development Corporation, and others, to dismiss for lack of subject matter jurisdiction and to abate or, in the alternative, transfer for improper venue; and the Court having reviewed the Motions and having heard the argument of counsel and being otherwise fully advised in the premises, finds and decides as follows:

1. This action involves a claim by the Plaintiff which in substance relates to the Plaintiff's claim to title of certain real property situate in Escambia County, Florida. Since the action is, therefore, a "local action" it should have been filed in Escambia County, Florida.

2. Under the circumstances, the case should be transferred to Escambia County, Florida. It is, thereupon,

CONSIDERED, ORDERED AND ADJUDGED that this case shall be and the same is hereby transferred to Escambia County, Florida. The Clerk of this Court shall transfer the pleadings file, or a copy thereof, as may be appropriate, to the Clerk of the Circuit Court in and for Escambia County, Florida. The Plaintiff shall be responsible for any filing fees or other transfer costs which may be incurred or required by the Clerk of this court, or the Clerk of the Circuit Court in and for Escambia County, Florida, in connection with such transfer. The Motions to Dismiss the Plaintiff's Complaint for failure to state a cause of action have not been heard or disposed of by this Court and the same remain pending. Accordingly, and under the applicable Rules of Civil Procedure, no Answer or other responsive pleading is yet due by those Defendants who have filed said Motions to Dismiss for failure to state a cause of action.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 12 day of March 1991.

/s/ J. Lewis Hall, Jr.
CIRCUIT JUDGE

Copies furnished to:
Philip A. Bates
Stephen R. Moorhead
Carl R. Pennington, Jr.
Emory O. Williams, Jr.
Albert C. Penson

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JACK D. KELLY, Individually and
JACK D. KELLY, as President,
Shareholder of Maple Leaf
Development Corp.,

Appellant,

Docket No.
91-01185

v.

TREE FARM DEVELOPMENT
CORP., Emory O. Williams, Jr.,
George G. Phillips, Jr., Bob Pierce;
and the Estate of Abraham L.
Pierce,

Appellees.

MOTION TO SUPPLEMENT THE RECORD ON APPEAL

Appellant, Maple Leaf, moves for an Order allowing the record or appendix to be supplemented by including subsequent proceedings of the lower court which regards Appellant's previous attorney's motion and order allowing him to withdraw and for grounds show:

1. Maple Leaf's attorney, Albert C. Penson, Esquire filed his motion to withdraw and a hearing was held on August 1, 1991, wherein the court allowed him to state his allegations and to withdraw. (Exhibit 1)

2. Maple Leaf objected to withdrawal seeking return of their attorney fees and a hearing on their attorney's adequate representation.

3. Maple Leaf was not allowed to present any evidence at the scheduled Motion to Withdraw hearing held

on August 1, 1991 (See attached Exhibit 2, Transcript of hearing).

4. a. The attorney Penson was recommended to Jack David Kelly and Maple Leaf Development Corporation by the Florida Bar in Tallahassee after Mr. Kelly requested an attorney to represent him in an action setting aside a proposed merger between Maple Leaf Development Corporation and Tree Farm Development Corporation.

b. After the attorney received their requested $5,500.00 retainer, the attorney failed to timely file the complaint even after Maple Leaf informed the attorney that a delay would cost Maple Leaf $5,000.00 each month. It took the attorney four months to file and eight months to have any motion heard.

c. After the complaint was filed and served, Maple Leaf's attorney refused to have a default entered after 20 days expired from service of the summons even though Jack David Kelly (Maple Leaf Development) instructed him to do so in the beginning. He promised that he would, saying "absolutely", and when he did not, Maple Leaf demanded that the default be entered as previously instructed and promised to do, and he refused.

d. The Attorney prepared no memo for the court to consider at the motion hearing.

e. One hearing was held for approximately twenty minutes including the time consumed for telephone conferences with the opposing counsel, Carl R. Pennington, Esquire, of Tallahassee Florida, and Philip

Bates, Esquire, of Pensacola, Florida, who did not personally appear. After the hearing the judge ordered that the case be heard in Escambia County Florida, rather than in Leon County Florida.

f. The attorney refused to appeal the change of venue even though he was instructed to and promised that he would without Maple Leaf paying an additional $5,000.00, not withstanding the fact that the attorney had previously been paid $5,500.00 as a retainer and was under contract to continue the case on an hourly basis.

5. The attempt to collect additional attorney fees appeared to Maple Leaf as an unlawful attempt to extract additional funds in view of the minimal work completed by the attorney in exchange for the amount that had been paid per the contract.

6. The Motion to Withdraw proceedings and the evidence sought to be presented but denied is necessary for this Honorable Court to consider in resolution of this appeal.

/s/ Burton E. Strubhar
BURTON E. STRUBHAR
3298 Summit Blvd., Suite 31B
Post Office Box 30215
Pensacola, FL 32503
(904) 432-7001
Fla. Bar No. 176414
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Supplement the Record on Appeal has been furnished to Phillip A. Bates, Esquire, 125 W. Romana Street, Suite 800, Post Office Box 13010, Pensacola, Florida 32501; Stephen R. Moorehead, Esquire, 700 South Palafox Street, Suite 3c, Pensacola, Florida 32501; Carl R. Pennington, Esquire, 3375 Capitol Circle, P.O. Box 13527, N.E., Tallahassee, Florida 32317; Emory O. Williams, Esquire, 306 Third Lane, Palm Beach Gardens, 33410; Estate of George G. Phillips, Jr. Esquire, ___ by U.S. Mail this 13th day of August, 1991.

/s/ Burton E. Strubhar
BURTON E. STRUBHAR

Exhibit 1

IN THE CIRCUIT COURT FOR THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

JACK D. KELLY, etc.,

Plaintiff,

vs.

TREE FARM DEVELOPMENT CORP., et al.,

Defendants.
_____/

CASE NO:
90-3398

ORDER GRANTING MOTION TO WITHDRAW

THIS CAUSE having come to be heard on the motion of attorney, Albert C. Penson, to withdraw as counsel for JACK D. KELLY, individually and JACK D. KELLY as President/Shareholder of Maple Leaf Development Corp., and the Court having reviewed the motion and the file and having found that JACK D. KELLY, individually and JACK D. KELLY as President/Shareholder of Maple Leaf Development Corp., is presently represented by counsel and the court being otherwise advised in the premises, it is hereby

ORDERED AND ADJUDGED that the motion of Albert C. Penson, to withdraw is hereby granted.

DONE AND ORDERED this 1st day of August, 1991, nunc pro tunc, in Chambers at Tallahassee, Leon County, Florida.

/s/ J. Lewis Hall Jr
J. LEWIS HALL, JR.
Circuit Judge

Copies to:

Albert C. Penson, Esquire
Philip A. Bates, Esquire
Stephen R. Moorhead, Esquire
Carl R. Pennington, Jr., Esquire
Emory O. Williams, Jr., Esquire
Burton E. Strubhar, Esquire
Jack D. Kelly

Exhibit 2

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

JACK D. KELLY,

Plaintiff,

vs.

CASE NO.:
90-3398

TREE FARM DEVELOPMENT
CORPORATION,

Defendant.

_____/

Transcript of hearing held before the Honorable J. Lewis Hall, Jr., at Leon County Courthouse, Tallahassee, Florida, on Thursday, August 1, 1991, commencing at 9:30 a.m. Reported by Jo Langston, Court Reporter and Notary Public.

MERIT REPORTING
Post Office Box 1496
Tallahassee, Florida 32302
(904) 224-6262

[p. 2] APPEARANCES

FOR THE PLAINTIFF: BURTON E. STRUBHAR,
ESQUIRE
Attorney at Law
3298 Summit Boulevard
Pensacola, Florida 32503

FOR THE DEFENDANT: ALBERT C. PENSON, ESQUIRE
Attorney at Law
701 East Tennessee Street
Tallahassee, Florida 32308

ALSO PRESENT: JACK DAVID KELLY
DEAN KOWALCHYK, ESQUIRE

[p. 3] THURSDAY, AUGUST 1, 1991, TALLAHASSEE, FLORIDA, 9:30 A.M.

-0-

THE COURT: I show on my little printout here that this is on a motion to withdraw.

MR. PENSON: That's correct, Judge.

THE COURT: I've not run across too many controversial motions for leave to withdraw. What is the problem?

MR. PENSON: Judge, I filed a motion to withdraw, essentially setting forth five reasons. All other counsel in the case have consented to the withdrawal. I sent Mr. Kelly a consent with regard to withdrawal. He did not sign the consent and instead filed an answer to my motion denying the allegations in my motion.

There's five – essentially five separate allegations forming the basis for my motion to withdraw. The first one regards ineffective communication with Mr. Kelly regarding the handling of his case, and that pertains mostly to telephone conversations that I had with him, followed up by written confirmation, followed up by subsequent telephone conversations in which the position

has changed, followed by a subsequent written communication, and it seemed that he and I were going [p. 4] in one direction on day one, and on day two we would go at a different direction. The inability to communicate is also found with regard to my inability to obtain certain information that I requested from him early on in the case so that I felt that I could proceed.

Then the third reason stated is noncompliance with our fee agreement. We have a signed fee agreement. Mr. Kelly is in substantial default with regard to that fee agreement.

The fourth allegation in my motion is that there's absolutely no prejudice to him at this stage of the proceedings. The parties haven't even answered, other than by filing their motions, which are now on appeal. I had alleged that Mr. Kelly had consulted with other counsel and was either representing himself in the appeal or had counsel representing him. It turns out that Ms. Caino (phonetic), who was originally representing him, is no longer in the appeal and Mr. Strubhar is. And, so, he has competent representation, you know, on the appeal at least.

I had written Mr. Kelly and indicated that I was not going to handle the appeal except under certain conditions. He did not meet the conditions and hired [p. 5] other counsel. I then also wrote him and told him that my only obligation would be to continue in the case if he abided by the other conditions of our fee agreement and we were able to effectively communicate. We haven't been able to do that. So, I move to withdraw.

THE COURT: Do you represent Mr. Kelly?

MR. STRUBHAR: Yes, Your Honor.

THE COURT: Are you representing him in this action at the appeals level?

MR. STRUBHAR: Yes, Your Honor.

THE COURT: Mr. Penson wishes to withdraw.

MR. STRUBHAR: Right.

THE COURT: I can simply say, without regard to any finding with respect to the allegations, Mr. Kelly is now represented by other counsel, make no finding with respect to the allegations, and give leave to withdraw.

MR. STRUBHAR: Judge, our position was only that Mr. Kelly retained him to represent him and paid him $1,000 and a $5,000 –

THE COURT: That's another matter, as far as I'm concerned.

MR. STRUBHAR: Right. But he alleged in the motion –

[p. 6] THE COURT: That's why I make no finding, which I don't think would be binding anyhow in the event of subsequent litigation or dispute over those issues. If you represent Mr. Kelly, I'll simply make a finding of record that Mr. Kelly is presently represented by other counsel and that Mr. Penson is given leave to withdraw.

MR. STRUBHAR: Judge, can the record reflect that we do contest those allegations, that they're not true and that it will be brought up in another proceeding.

THE COURT: Well, you've already filed an answer denying them.

MR. STRUBHAR: Right.

THE COURT: So, I don't need to have any other grounds. As far as this decision is concerned, the allegations or any finding with respect to them is moot. Your own record is denying them.

MR. STRUBHAR: Sure, certainly. We had evidence to show the reason that we denied them. And we're saying here that you don't need to hear that or it's not relevant to this hearing.

THE COURT: No. If he's represented by counsel of his choice, then I don't need to go into anything else.

MR. PENSON: Judge, I'll prepare an order that [p. 7] has a finding that Mr. Kelly is represented by other counsel, and on that basis, leave to withdraw is granted.

(Whereupon, the hearing was concluded.)

CERTIFICATE

STATE OF FLORIDA)
COUNTY OF LEON)

I, Jo Langston, County Reporter and Notary Public at Leon County, Tallahassee, Florida, do hereby certify that the foregoing pages 3 through 7, both inclusive, comprise a true and correct transcript of the proceedings; that said

proceedings were taken by me stenographically and transcribed by me as it now appears; that I am not a relative or employee or attorney or counsel of the parties, or a relative or employee of such attorney or counsel, nor am I interested in this proceeding or its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this this [sic] 2nd day of August, 1991.

/s/ Jo Langston
Jo Langston, Court Reporter
and Notary Public,
State of Florida at Large.

My Commission Expires: 6/6/93.